U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue date: 28Aug2002

Case No.: 1998-LHC-02298

OWCP No.: 03-26221

In the Matter of

EUGENE FLOYD
Claimant

v.

PENN TERMINALS INC.,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.
Carrier

Appearances:

Kevin J. Kotch, Esquire
For Claimant

John E. Kawczynski, Esquire
For Employer/Carrier

Before: **PAUL H. TEITLER**
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for disability compensation filed by Eugene Floyd, Claimant, pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (the Act).

The findings of fact and conclusions of law which follow are based upon my thorough analysis and review of the entire record, arguments of the parties, and applicable statutes, regulations, and case law. Each exhibit entered into evidence, although possibly not mentioned in this Decision, has been carefully reviewed and considered in light of its relevance to the resolution of a contested issue. Where evidence may appear to conflict with the conclusions in this case, the appraisal of the relative merits and evidentiary weight of all such evidence was conducted strictly in accordance with the quality standards and review procedures set forth in the Act, regulations, and applicable case law.

STIPULATIONS

At the hearing, the following stipulations were entered into the record:

1. The Act (33 U.S.C. §§901-950) applies to this claim;

2. Claimant and Employer were in an employer-employee relationship at the time of the accident/injury;

3. The accident/injury arose out of, and in the scope of, employment;

4. The date of the accident/injury was April 27, 1996;

5. It is agreed that timely notice of injury was given Employer;

6. Claimant, at no point in time, could return to his pre-injury job.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Claimant is a fifty-one (51) year old terminal worker who was injured in the course and scope of his employment with Employer on April 27, 1996. EX 1 & 2; CX 1 & 2.[1] At that time, Claimant was bending over to pick up a mooring line when he heard a "snap" and felt a "burning" sensation in his back. EX 1 & 2; CX 1 & 2.

Initially a formal hearing was scheduled for July 8, 1998 in Camden, New Jersey. At that time all parties were afforded a full opportunity to present evidence and arguments as provided in the Act and applicable regulations. On that date, and prior to the taking of testimony, Claimant and his attorney, Aloysius Staud, Esq., along with Employer/Carrier's attorney, John E. Kawczynski, Esq., agreed to a settlement.

---

[1] In this decision, "CX" refers to Claimant's exhibits, "EX" refers to Employer's exhibits, and "TX" refers to the transcript of the hearing or deposition transcripts as noted.

Claimant received the sum of $50,000.00. His attorney, Mr. Staud, was to receive the sum of $8,000.00 in total fees and expenses for his representation.

Claimant thereafter appealed pro se to the Benefits Review Board ("Board") and claimed that he spent the $50,000.00 for living expenses. Claimant also stated that he felt his attorney "did not get the job done." The Board, in a "Not Published" Decision and Order dated August 4, 1999, remanded the case for further proceedings. A formal hearing was again scheduled on December 6, 1999. A different attorney, Bernard M. Berman, Esq., advised the undersigned that he was now representing Claimant. Berman subsequently requested a postponement of this hearing. Accordingly, a pre-hearing conference was scheduled for January 10, 2000. However, on December 22, 1999, Berman withdrew his appearance.

On January 4, 2000, Mr. Floyd telephoned the undersigned to advise that he was seeking new counsel. Therefore, the pre-hearing conference scheduled for January 10, 2000 was continued to May 24, 2000. However, because Claimant had recently hired Keith A. Halterman, Esq., the May hearing was again continued in order to provide his newfound counsel time to prepare his case for trial.

A hearing was scheduled for June 27, 2000. At this hearing, Claimant agreed to submit an updated LS-200 form, outlining the Claimant's employment history since the date of injury. On July 19, 2000, Employer served an LS-200 to the Claimant and on July 24, 2000, the undersigned scheduled a new hearing date for September 7, 2000. At this hearing, Claimant did not provide an LS-200 to Employer as ordered at the June 27, 2000 hearing. Employer filed Interrogatories and Requests to Produce on September 12, 2000 in an effort to further the discovery process. These requests were re-sent on October 23, 2000 and the case was again scheduled for January 8, 2001.

The January hearing date was again continued because Claimant did not return the updated LS-200. The case was continued to March 12, 2001, but was continued, and the undersigned Ordered the Director Office of Workers' Compensation to obtain a new and independent examination. However by letter dated March 6, 2001, Claimant informed the undersigned that he was "removing Mr. Halterman." At the request of the undersigned, the Claimant was examined by Dr. Bong S. Lee, an independent medical examiner on May 1, 2001. A new hearing was scheduled for May 15, 2001. Thereafter, Dr. Lee was sent by the undersigned, at the request of respondent's counsel, a vocational labor market survey for him to approve or disapprove jobs that Mr. Floyd had the residual capacity to perform. On July 25, 2001, Employer/Carrier's counsel filed a Motion to Dismiss. On August 2, 2001 Kevin J. Kotch, Esquire filed a Notice of Appearance on behalf of the Claimant. On August 2, 2001 the Motion to Dismiss was argued, and on October 10, 2001, I issued an Order granting said motion. However, after Claimant filed a motion for reconsideration, I withdrew my previous Order dismissing this case and set a hearing date for March 18, 2002 at the above captioned

address. This hearing took place as scheduled and both parties submitted closing briefs. The case is now ready for my decision.

ISSUES

The parties have identified the issues that they seek to be resolved and they are listed below:

1. Claimant's Average Weekly Wage (AWW);

2. The nature and extent of any disability;

3. The forfeiture of benefits under 33 U.S.C. §908(j);

4. Whether Claimant is entitled to medical benefits,

5. The certification of facts in this matter to the United States District Court of the District of New Jersey.

SUMMARY OF THE EVIDENCE

Claimant's Testimony.

A. June 27, 2000

Mr. Floyd initially testified on June 27,2000 at a hearing in Camden, New Jersey. At the time represented by Keith Halterman, Esq., Claimant wanted to re-open his case. TX 07. Claimant stated that his case was unfairly settled and that he is entitled to a larger lump sum in light of his ability to make more than $20,000.00/year and further ability to work at least another thirty years. TX 07. Claimant believed that these are the figures which should have correctly been used to deduce his lump sum settlement. The court explained to Claimant under the Act, he had two options: (1) continuing disability or; (2) a lump sum payment. TX 09. Claimant stated, though counsel, that he was seeking to get reinstated to a compensation rate, especially since he was on Public Assistance at the time. TX 10. Employer, through counsel, took a position that they would not reinstate him until he repaid the $50,000.00 that was given to him in a lump sum settlement. TX 12. Further, Employer argued that Claimant was working, so the most he would be entitled to receive would be a reinstatement of partial disability benefits.

Employer also demanded that Claimant return a properly documented LS-200 listing his earnings from the period he was claiming disability. Employer's counsel stated that the LS 200 was mailed to Claimant and received on August 6, 1999. The

form asked

Claimant to indicate earnings from February 22, 1998 through August 6, 1999. Claimant's then counsel, Mr. Halterman, indicated that he was just then seeing the form for the first time. TX 15. Claimant then stated, "I'm not quite sure I've seen it either." TX 16. Shortly thereafter, Claimant's counsel took a position that Claimant had never been paid the proper compensation rate after the accident. TX 16. At that point, Employer's counsel suggested that Claimant send back the $50,000 and then Employer would be glad to re-litigate all the issues. TX 17.

Claimant's counsel did not have any information to change the disability rate. TX 20. The manor of arriving at the disability rate was explained to Claimant: previous counsel agreed to accept a partial rate of $200.00/week. TX 21. However, Claimant argued that he made $489.63 per week, yielding a disability rate of $326.42/week. TX 22. In light of this discrepancy, the parties agreed with the Court in that a new LS-200 needed to be filled out in addition to a physical examination being scheduled with an independent medical examiner provided by the Director. Further, Claimant's medical complaints would be investigated and an MRI would be performed. Following these events, the case would be tried.

B. March 18, 2002

Claimant testified that he started working for Employer on March 4, 1994 as a basic labor terminal worker. TX 18. This job entailed a variety of possible assignments, including working inside the hold of a ship, inside a warehouse, on a forklift, etc. TX 18. This included having to tie a ship, which involved four men pulling a rope from the water in order to tie the ship to shore. TX 20. Also, Claimant stated that he occasionally had to perform "lashing." TX 22. This duty involved tying heavy cargo to the ship so that contents would not shift while in transit. TX 22. This involved the lifting of heavy chains; these chains weighed seventy-five to one hundred pounds. TX 22. At the same time, Claimant testified that all of his possible assignments on any given day would include extensive bending, standing and walking. TX 23.

Claimant stated that on April 27, 1996, he was tying up a ship with a double cable. TX 24. He reached down to pull the cable and heard a snap and burning. TX 24. He had a couple days off after this incident and when he came back, his co-workers noticed that he was walking "crooked." TX 24. Subsequently, Claimant sought professional help. TX 25. After first seeing a chiropractor, Peter Schatzenberg, he sought treatment with Dr. Grosinger. He stated that the last time he received any treatment for his back was in October, 1997. TX 26. In July, 1996, Dr. Tadduni stated that Claimant could return to work. TX 26. Upon his return to work, Claimant stated that

he worked as a cord watcher; that is, he made sure that the crane would not accidentally run over its own power cord.[2] TX 26. He stated that he was required to move the cord so as to insure that it would not be accidentally cut. TX 30. Also, Claimant stated that he would also have to drive a yard truck as part of his light duty assignments. TX 31. This would entail driving a truck for 8-12 hours/day. TX 32. Also, Claimant stated that he occasionally would have to clean the lunchroom or a warehouse or something of that nature. TX 32.

Claimant further stated that prior to his injury, he was assigned to cord watching approximately 20-25 times. He stated that he was never assigned to cleaning duty. He stated that the Employer does not hire people strictly for light duty assignments. TX 33. After being let go from Employer, Claimant stated that he worked for White Marsh Security patrolling warehouses. TX 34. He stated that he was told to make the rounds for 35 minutes at a time, go up and down stairs, etc. TX 35. However, Claimant stated that he could not do this on a regular basis, so he left the company. TX 35. Subsequently, he worked with another security company by the name of Folk. TX 35. The same situation developed at Folk so the Claimant also left their employ. When asked about working for Day and Zimmerman, Claimant could not recall. TX 37. Also, Claimant testified to working at Elwyn, Inc., for a training program. As a result of not being able to stay awake, Claimant did not continue on to work for Elwyn. TX 37. Finally, Claimant testified that he worked for Labor Ready as a flag man. This job turned out to be too much for him in light of the extensive standing. TX 37. Also, Claimant spent some time with another temporary agent in Tempe, AZ. TX 38. Claimant stated that he helped move appliances on dollies for one day. Claimant stated that this was stressful and caused some back spasms. TX 38. Prior to working for Employer, Claimant stated that he was a janitor, roofer, fast food worker, liquor store clerk, counselor, and labor union employee. TX 38.

Claimant stated that his injury affects him today in that he is stressed and paranoid, cannot play any pick up sports, play with his grandchildren, comfortably use the bathroom, or enjoy any type of sexual activity. TX 39. Claimant stated that he is unhappy and that he cannot return to his job as a longshoreman. TX 39. Claimant stated that this is because at least three or four times a day he has to stretch his back in order to alleviate some pain. TX 40. Claimant also stated that he believes that he could have been making $40,000/year if had stayed with Employer for another two years. TX 40.

On cross-examination, Claimant stated that he remembered receiving a letter from Employer requesting that he return the $50,000 settlement in light of the current proceedings. TX 46. Claimant does not recall filling out any LS-200 forms. TX 47.

---

[2] However, compare to Mr. McTaggart's description of the same job, which does not involve moving the chain at all. *See infra*.

Regarding his former employment with Employer, Claimant stated that he was fired. TX 48. After working for four months on light duty assignments after his injury, Claimant stated that he was written up one day for insubordination. That is, he stated that his supervisor, Pat McTaggert, stated that he was not standing in the correct spot to perform his cord watching duties. TX 50-51. Following this incident, Claimant stated that he filed a grievance with his union which nevertheless resulted in his being fired. TX 53.

On a subsequent application for Employment with White Marsh Security, Claimant stated that he worked continued to be employed by Employer. Claimant stated that he believed himself to be injured and/or disabled, and therefore, unable to be fired by Employer regardless of the aforementioned incident with his supervisor. TX 56. Further, Claimant stated that he was caught sleeping on the job at White Marsh Security and therefore terminated. TX 56. On an employment application for Folk Security, Claimant also stated that he was still employed by Employer. TX 57. Claimant stated that he later worked for Dobbs House, Pennsylvania Liquor Stores, Patton Roofing, and Stanley Smith Security. TX 57-58. Claimant stated that the last company he worked from since the accident was in Arizona for one day in August, 1999. TX 60.

Claimant stated that he has never worked at any of the jobs approved by Dr. Lee, including hotel clerk, doorman, cashier, or locker room attendant. Yet, he has worked as a security guard, which was also approved by Dr. Lee. TX 62. Additionally, Claimant testified that he never worked any of the types of jobs listed on the Labor Market Survey. Claimant further testified that he could not total the amount of jobs he has worked in his lifetime; he stated that he has worked a good number of them. TX 64. Currently, Claimant stated that he survives on public assistance in the amount of $120/month in food stamps and $205-210/month in public assistance, and Keystone Mercy Health Coverage. TX 64-65.

Regarding the date of injury, April 27, 1996, Claimants stated that he was told to take two days off, then he returned to work until May 6, 1996, when he was put on compensation. TX 68-69.

Witness Testimony: Patrick McTaggart.

A. March 18, 2002

McTaggart stated that he is a front-line supervisor of marine operations with Employer and currently lives at 518 Sharpless Road in Springfield, Pennsylvania. TX 69-70. He stated that he has been employer by Employer for eleven years. He also stated that he has a High School diploma and two years of college.

McTaggart testified that Claimant is no longer employed with Employer and was

discharged for insubordination. TX 71. On the day of the incident, McTaggart stated he was the supervisor as Claimant was watching the cord. He described the cord watcher position as keeping the crane operator informed of where the cord is, if there is some kind of problem; if there is a communication breakdown, the watcher is supposed to hit the emergency stop button. TX 72. Also, if the crane is about to cut the cord, then Claimant is to hit the emergency stop button. TX 73. He further testified that employees are not to touch the cord in order to prevent injury; cords are to be moved only by authorized personnel. TX 73. On the date of Claimant's insubordination, McTaggart saw the Claimant sitting in a booth and not watching the cord. TX 73-74. He stated that he repeatedly told Claimant to stand in a position where he could better watch the cord; he also called over the shop steward to tell the Claimant the same. TX 74. After determining that the Claimant was not going to follow these instructions, McTaggart asked for the radio back; upon refusal, he had Claimant removed from the premises. TX 74.

After the incident, McTaggart stated that he filed a report stating that the main problems with Claimant were in work performance. TX 75. He also stated that other employees have been put on this assignment and that they do not have to be on light assignments to perform this job. TX 75. He stated that if Claimant had not been terminated, it is likely he would still be with the company today; they have many employees on light duty assignments. TX 76.

On cross-examination, McTaggart stated that Employer does not hire people strictly for light duty jobs. TX 76. He stated that they have approximately fifteen people on light duty restrictions and they are shuffled in and out of assignments. TX 77. McTaggart stated that he knew Claimant was on light duty restrictions. He stated that Employer does not have a position for permanent cord watchers. TX 78. Instead, people are hired every day, based on seniority and need for the day. TX 78. At the current time, he stated that Employer is not hiring and that there is no need for a cord watcher as the crane which requires such, is not in use. TX 79-80. Since, 1996, Employer has decreased employees from 120 to 80 full-timers, 8 part-timers. TX 80. McTaggart attributes this decrease to layoffs in 2001 and simple attrition. TX 81. He explained that Employer uses approximately 30 people on a consistent basis; the remainder are called if/when needed. Of those thirty, about five or six are light duty workers. TX 82. Light duty workers, he stated, that can only drive a yard truck/tractor trailer are probably further limited to 2 days/week. TX 85.

McTaggart stated that he worked with Claimant prior to 1996 and that he never had a problem before; he has often told people to go home or that they are not needed. TX 86. Regarding the lunchroom cleaning position, it is not done with regularity but more on an as needed basis. TX 88. McTaggart stated that he did not know of a time that the crane ran over the cord while Claimant was on duty as a watcher. TX 88.

On re-direct examination, McTaggart stated that of the fifteen employees on light duty, there are various reasons as to why; these may include diabetes, shoulder tendinitis, arthritis. TX 90.

Medical Testimony: Dr. Bong Lee, M.D.

A. April 23, 2002

Dr. Lee testified that he is certified by the American Board of Orthopedic Surgery and licensed to practice in New Jersey, Pennsylvania and Delaware. TX 6. He stated that he examined the Claimant on May 1, 2001. TX 6. He further testified that the Claimant stated that he injured his low back on April 27, 1996 while picking up heavy rope at his job as a longshoreman. Initially, Claimant was seen at Taylor Hospital, examined and discharged. Subsequently, he went to see Dr. Schatzberg and was treated with physical therapy for three months. Dr. Lee stated that Claimant was also seen by Dr. Grossinger, a neurologist, and underwent MRI, EMG and x-ray studies. He stated that Claimant was under the notion that he had a disc herniation and nerve injury. TX 8. Claimant was recommended to have an epidural block, which he received in 1997 twice and once in 1998. He also received aqua therapy for five months.

At examination, he stated that Claimant mentioned low back pain, burning pain down to the testicles and was unable to return to work as a longshoreman. He further stated that he worked as a security guard in 1997 & 1998 but could not sustain employment for longer than five months. At the time of the exam, Claimant was not working. He complained of difficulty getting out of bed, and using the toilet. TX 9.

Upon exam, Dr. Lee noted that Claimant is in no acute distress, walking with normal gait. His range of motion of the low back was performed by bending forward, noting that his curve reversed very well, but he complains of pain in the low back area with extreme of flexion. TX 10. Further, Claimant's muscles were taut, meaning that upon standing, he guarded his spine, but he is not in any true muscle spasm. In the prone position, Claimant has local tenderness of the lumbosacral area. In the supine position, all major articulation was normal configuration, and full range of motion with no complaint of pain. Straight leg raising tests revealed a complaint of pain beyond 60 degrees or elevation of both legs. TX 11. Dr. Lee stated that this was a sign of tension of the sciatic nerve. TX 11.

Upon review of the MRI study done on May 29, 1996, Dr. Lee noted that there was a central disc herniation at L4-L5 and also at L5-S1. TX 12. He also had a report of the EMG nerve conduction done by Dr. Grossinger on June 4, 1996, which shows bi-lateral L5-S1 radiculopathy. And he also reviewed office notes of Dr. Schatzberg, Dr. Grossinger and also the evaluation note by Dr. Tadduni from May, 28, 1996. It was Dr. Lee's opinion that Claimant has multiple problems of the spine with disc pathology and

some evidence of lumbar radiculopathy. He believes this is a result of the incident of April 27, 1996, in light of no history of any pre-existing back problems or any other treatment prior to this incident. TX 13. He also believes that Claimant has not reached the maximum medical benefit and

he does require continued treatment. In his opinion, Claimant cannot return to his previous employment as a longshoreman; but Dr. Lee believes that Claimant can return to a modified duty position of sedentary or light-duty nature. TX 14.

Dr. Lee testified that he wrote a letter on July 10, 2001 reviewing jobs from a labor market survey. TX 14. He stated that he also reviewed a second labor market survey and believes that the Claimant can perform the reviewed jobs. TX 15.

On cross-examination, Dr. Lee testified that he does not remember meeting the Claimant and examining him. He stated that he is testifying based on office notes from the exam. TX 16. He stated that he did not believe that Claimant was making up his complaints; he believed them to be sincere. TX 17. He opined that it is possible for Claimant to have injured his L4-L5 discs during his job as a longshoreman. However, he also stated that he is not sure whether this disc herniation is totally the result of the one episode on April 26, 1996. Nevertheless, Dr. Lee stated that the medical record and Claimant's own statements of his medical history indicate that there is not any problem of the back or any back condition prior to 1996, so the complaints must stem from the 1996 incident. TX 18. He stated that the herniation is not always the cause of symptoms; symptoms are not usually associated with impingement of the nerve where the disc herniated. But if the disc herniation does cause impingement, then the symptoms may not be resolved. TX 19.

Regarding Claimant's attempts at working in security jobs, Dr. Lee stated that he did not know the circumstances of each, but in general Claimant's condition is pretty stable and there is not any gross impairment of his motor function or sensory functions. It is Dr. Lee's opinion that Claimant would be able to do light duty duties and certainly sedentary activity is acceptable. TX 22.

Dr. Lee stated that he reviewed the EMG from 1996 and that it could be different today in that it could show much better nerve function. The EMG was consistent with the MRI in terms of the level of his nerve involvement. The EMG is more of a subjective test than the more objective MRI. TX 23. However, Dr. Lee cannot state that there would be a definite improvement. Dr. Lee stated that he cannot testify as to the Claimant's condition in 1996, 1997, 1998, 1999 or 2000. He also stated that Claimant has not reached Maximum Medical improvement, but there are no signs of deterioration. TX 24. Also, there are no signs that Claimant's deterioration will be any faster than normal, given his stabilization over recent years. TX 25.

Regarding Dr. Lee's approval of various jobs, he stated that he did not consider Claimant ready to operate heavy trucks. He placed no restrictions on sitting, but stated that he believes that there should be significant restrictions on pushing and pulling. He further stated that a job where Claimant would be sitting for much of the day is ideal. TX 28. It is better than a position which may require extensive standing or walking. TX 29. In summary, Dr. Lee stated that the real problem areas as far as job restrictions for the Claimant would be having to constantly walk around, lift, push, and/or pull. TX 30.

Finally, Dr. Lee stated that he does not believe Claimant will eventually return to 100%. TX 31. Over the course of time, Claimant's nerves will have a greater likelihood of being impinged. TX 31. Regarding Claimant's complaints of pain around his testicles, Dr. Lee stated that the EMG is not really consistent with such pain. He characterized this complaint as a mild case of some irritation of the nerve that has not manifested any noticeable neurologic impairment. TX 33.

Medical Testimony: Dr. Gregory T. Tadduni, M.D.

A. April 25, 2002

Dr. Tadduni testified that he graduated from Albert Einstein College of Medicine in 1982; did an internship and residency in orthopedic surgery at the University of Pennsylvania, 1982-1987, an additional 18 months of fellowship training at Penn and at Jefferson, 1987 and 1988, then started in private practice in January, 1989. He stated that he has been board certified since 1991in Orthopedic surgery and in active orthopedic practice, including seeing patients in the office and the hospital for both surgical and non-surgical treatment. TX 5.

Dr. Tadduni testified that he examined the Claimant on 5/28/96, 5/8/97, 10/17/01 and 9/25/01. TX 6. He also stated that the details of all these examinations are recorded in his reports. TX 7. On September 25, 2001 (EX 29), he stated that he took an interim history: Claimant was 50 years old, had not worked since October, 2000 and for some time prior to that. TX 7. Dr. Tadduni stated that Claimant reported low back complaints that would come and go as well as pain in his testicles, but no other symptoms. TX 8. Further, Claimant indicated that he was generally tired and overweight and that he feels as though he has gained 60 pounds in the time that he has not been working. TX 8.

Dr. Tadduni also testified that Claimant's stated symptoms of pain and discomfort at night were atypical. These symptoms were to be expected during the active hours of the daytime. TX 9. Further, he stated that Claimant's chest pain did not make sense in the context of a person who complained of lower back pain. TX 9. He stated that the Claimant did not indicate any recent treatment; he stated that he was not taking any medication and that his physical exam indicated that he was overweight, had normal

posture, could move on and off the examination table without problem. Dr. Tadduni stated that his range of motion was 95 degrees of flexion, which is a little bit better than normal, 40 degrees of extension, and 40 degrees of lateral bending, which would also be normal; these were all without any complaint in the lower back. TX 10.

Upon the root test, which is used when looking for nerve root irritation in the lower back, Claimant complained that he had pain in his lower back but not any symptoms of pain radiating into the testicles or down the legs. Straight leg raises indicated positively on the right and negatively on the left, which is inconsistent in that it should match the sitting root response. TX 11. At the end of the exam, Claimant would have been lying supine on the examining table. Claimant then sat up with his hips flexed 90 degrees, his knees extended zero degrees; this position exactly reproduced the straight leg raising test. Claimant went on to explain his situation while seated in this position. Dr. Tadduni noted that this is the exact opposite thing that he would have expected from someone who had back complaints with a positive sitting root test. TX 12. He stated that a patient with a low back problem would not even sit up into that position with the legs extended along the table and then change. Instead, they would immediately swing their legs over the table and bend their knees so that they are comfortable. TX 12.

Prior to issuing his report, Dr. Tadduni stated that he also considered the evaluation by Dr. Lee in May, 2001. This report indicated that Claimant had not reached maximum medical improvement, did have an internal derangement of the lumbar spine, and the treatment should include a loss of weight, rehab, medication and possibly a steroid epidural injection. To Dr. Tadduni, this report indicated that the Claimant was not totally disabled and certainly could be involved in various types of work activity, even if Dr. Lee was giving him the benefit of the doubt and evaluating him without the complete knowledge of what his course had been. TX 15.

Dr. Tadduni's diagnostic impression was that there were still significant questions with regard to how much disability Claimant had that he subjectively reported. Dr. Tadduni notes that the treatment he had been receiving, such as aqua therapy, is passive treatment and not the type likened to persons with totally disabling back problems TX 16. Claimant's indications that he was not treating his back as a result of the inability to pay bills is an oversimplification, according to Dr. Tadduni. TX 16. Dr. Tadduni stated that the last time Claimant treated for his back was with Dr. Schatzberg in 1997. TX 17. Prior to that, he stated that Claimant had periodic treatment with Dr. Grossinger, but they were mostly examinations. TX 17.

Dr. Tadduni stated that he does not think that the Claimant is a candidate for surgery. TX 18. Instead, he believes that the Claimant is not fully disabled and that he could function at least at the level outlined in his functional capacity evaluation. TX 18.

The diagnosis, as far as Dr. Taddni was concerned, was lumbar degenerative disc disease that clearly predated his 1996 injury based on the findings of the 1996 MRI. Therefore, these injuries were not the result of the [April, 1996] injury. TX 19. Instead, they occurred before the injury, possibly going back to his 1994 lower back complaints. TX 19. Dr. Tadduni did not believe that Claimant had radiculopathy but he did believe that Claimant had reached maximum medical improvement. TX 19. He stated that he reviewed labor market surveys and that Claimant could, in his opinion, be involved in various of these positions: and these positions included hotel front desk clerk, food preparation, receptionist, parts truck driver if the lifting and bending were within the restrictions outlined, cashier, security guard, locker room attendant and janitor, again if the lifting and bending restrictions could be adhered to. TX 19.

Regarding the March, 2002 labor market survey, Dr. Tadduni's stated that he would approve the four positions under security guard, the two positions under telephone operator and one of the two driver positions. TX 20. The carriage position, requiring riding carriages over cobblestones would be restricted. TX 20. As far as the dispatcher and cashier positions, Dr. Tadduni feels as though Claimant could adequately perform them. TX 20.

Regarding the October 17, 2000 examination, Dr. Tadduni stated that the Claimant has similar complaints but the chest complaints were not present at that time. TX 21. Instead, the complaints were in the proximal thighs, testicles and lower back. Treatment included saunas and electric stimulation with Dr. Schatzberg. On examination, Claimant again showed a full range of motion without complaint and no spasm in the lumbar spine, no evidence of weakness or sensory abnormality. Reflexes were elicited both at the knees and the ankles. His sitting root test was negative and his straight leg raise was positive bilaterally. Dr. Tadduni stated that, again, this would be an inconsistency in that they should correspond. TX 22.

The medical records indicated that he had seen Dr. Grossinger in January of 1998 and he had also had a functional capacity evaluation in August, 1997, which did not provide specifics in terms of how it was termed to be valid but was decided to be valid and indicated he could lift up to 50 pounds, carry up to 40 pounds occasionally, push and pull up to 100 pounds maximum. TX 22. Following the examination, Dr. Tadduni basically referred back to what was outlined in his 1997 report and indicated that even with his subjective complaints, Claimant could function within the capacities outlined in the functional capacity evaluation. He stated that he disagreed with Dr. Grossinger's very restrictive capacities of allowing Claimant to sit, stand, or walk only for 10 minutes at a time. TX 23. Instead, Dr. Tadduni believed that it was more reasonable to conclude that Claimant was fully recovered than it was to conclude that he was disabled at that level. TX 23.

Returning to the May 8, 1997 exam and report, Claimant had been involved in

light duty work that involved riding around, watching, picking up small items and running errands. His complaints at that time were low back pain, pain in the testicles, pain in the lateral and posterior thigh. TX 25. Dr. Tadduni stated that this would be the third different response to the question regarding symptoms. TX 25. Dr. Tadduni stated that in 2000, Claimant stated that the injury affected his lower back, in 2001, it affected his chest, and in 1997, it affected his right flank and low back. TX 26. His exam indicated a normal curvature, no tenderness, and no limitation of motion. TX 26.

Dr. Tadduni stated that additional records reviewed at that time indicated that Claimant had seen Dr. Grossinger on 6/4/96 and given him the same report: no history of low back problems prior to his 1996 injury. Dr. Tadduni stated that this is not accurate. TX 28. Dr. Grossinger noted on his EMG that he had bilateral L5 and S1 radiculopathy, which would be difficult to reconcile with the MRI or with the patient's physical exam. TX 28. Dr. Grossinger saw the Claimant in December, 1996, and indicated that he had improvement in his groin complaints by December 1996, and that his neck stiffness and pain had resolved. Dr. Grossinger indicated that Claimant had spasm, which was certainly not the case on my exam. In 1997, Dr. Grossinger saw the patient and the Claimant indicated that he had complaints of pain in the low back radiating to both legs and feet, which is certainly not the pattern that is seen in most of the medical records. In March, 1997, Dr. Grossinger had seen him with complaints now only to the right testicle. He had only transient responses to his epidurals on 1/30/96 and 2/18/97. TX 29. Dr. Tadduni stated that his opinion at that point was that the pattern that the patient reported in terms of his complaints seemed to vary between his exam and various different times in the medical record. The physical exam that Dr. Grossinger described was certainly not the physical exam that I had found where the patient had no limitation of motion, no spasm, no decrease in his ankle jerk reflexes, no tension signs, and he certainly did have evidence of symptom magnification. Claimant did not have any evidence of weakness in L5 or S1 distribution and no sensory decrease in those dermatomes.

Dr. Tadduni's opinion was the patient did not have ongoing lumbar radiculopathy; did have numerous inconsistencies on his exam and in the medical record, including the fact that he had denied any previous low back problems or symptoms predating his injury in 1996; and he again indicated that if any of his physicians truly believed that Claimant had ongoing radiculopathy, that the next step would be a myelogram. TX 30. Dr. Tadduni further stated that he did not believe the Claimant to be totally disabled even if given the maximum benefit of the doubt. TX 30.

Dr. Tadduni next discussed his May 28, 1996 report. TX 31. This report was his initial evaluation. TX 32. He stated that his complaints at that time were low back pain at the L5 level and intermittent pain in both testicles. He further stated that Claimant was treating with Dr. Schatzberg and was due to have an MRI. He stated that Claimant's history was that on 4/27/96, he pulled a cable wire and felt pain in his lower

back. TX 32. After visiting the Emergency Room (ER) that day, he was evaluated with a muscle strain and released. TX 32. He testified that the Claimant told him that he went to Dr. Schatzberg, a chiropractor, after he found him in the Yellow Pages. TX 33. Previously, he treated with Dr. Paul Epstein, who was a primary care doctor, but felt that Dr. Shatzberg was more qualified to deal with his problem. TX 33. Dr. Tadduni stated that Claimant stated that his surgical history was significant for a previous knee surgery and he also indicated that the only injury he had was his knee injury and the April, 1996 injury. He stated that Claimant did not state anything specific about a prior trip to the ER other than for colds. TX 33. Dr. Tadduni later learned of an ER visit in 1994 for low back problems. TX 34.

His physical exam at that point was similar in terms of gait and sitting on the exam table. TX 34. He reported tenderness in the lumbar spine at L5 in the midline and sacroiliac joint. His range of motion was 95 degrees of flexion, allowing him to touch his toes, with normal extension and normal lateral bending, and again all of these were without complaint. TX 34. His gait was normal, regardless of Dr. Grossinger's report of abnormal gait. TX 35. His sitting root test was negative on both sides, his straight leg raises were positive on both sides, which is an inconsistency; his right knee showed evidence of surgery. TX 35.

Dr. Tadduni's impression at the time was that Claimant had a history of injury and presented with subjective complaints and that the type of soft tissue strain that it appeared to be would be expected to recover in two to six weeks. TX 36. He stated that Claimant had essentially a normal physical exam with an objectively normal exam and subjective complaints that were inconsistent. TX 37. He stated that Claimant could be involved in modified duty with restricted bending, restricted lifting, and that was basically because the MRI was pending. TX 37.

In looking at the four examinations that were conducted over the course of five years, Dr. Tadduni testified to a pattern of complaint the low back and in the testicles in a patient who doesn't have a diagnostic picture which would explain that testicular complaint. TX 38. He stated that there is a pattern of maintenance of full range of motion of his lower back in the absence of treatment beyond the 1997 point, which is indicative of a lack of ongoing pathology of significance. TX 38. He stated that even in someone with degenerative disc disease is able to maintain enough range of motion of his lumbar spine to flex to 10 degrees, and Claimant carries that out without complaint. TX 39. Dr. Tadduni testified that there are a lot of inconsistencies in terms of, for example, sitting root test versus straight leg raise, and that Claimant is reporting subjective symptoms at various points on the exam that are really not there. TX 40. He further stated that all of this is consistent with the fact that Claimant had really not had a diagnosis that explains his symptoms, is not really involved in treatment, is not taking medication for pain, had not given an accurate history, and likely is involved in a situation where he actually has a medical problem. TX 39-40. Additionally, Dr. Tadduni

indicated that there is clearly a record indicating that Claimant had been seen in the ER in 1994 and then given a certificate of disability in 1995 for a low back complaint, although he indicated to me he never had a problem with his lower back until 1996. TX 40.

Following the May 28, 1996 examination, Dr. Tadduni stated that he placed the Claimant on limited bending with a 20 pounds frequently, 40 pounds occasionally, weight lifting restriction. TX 41. He also stated that Dr. Lee's lifting restrictions were more restrictive in that he restricted prolonged walking, standing and climbing. TX 42.

On cross-examination, Dr. Tadduni stated that he examined the Claimant on May 28, 1996, May 8, 1997, and October 17, 2000. TX 44. All of these exams lasted between 17 and 25 minutes. TX 44. As for the September 25, 2001, exam, Dr. Tadduni stated that it probably lasted within thirty minutes. TX 45. Although he had seen Dr. Opsitnick's disability certificate, he was mainly influenced by the subsequent MRI findings which were seen to be pre-existing and also the fact that the history given was inconsistent. TX 46.

Regarding the 9/1/94 ER records, Dr. Tadduni stated that it stated a very specific history of back pain and bilateral testicular pain for six weeks and radiating into the upper thighs and testicles. This is the exact same pattern that Claimant gives at the various times that Dr. Tadduni examines him; unusual but specific and clearly present about a year and a half prior to when he reported having an injury that subsequently led to that. TX 49. Dr. Tadduni stated that the significance of that is that it is the same pattern and because Claimant specifically told him that he had never had a problem with his back, so it is a credibility issue. TX 49.

Dr. Tadduni stated that it would be fair to say that there is no record of a herniation prior to the MRI in 1996. TX 50. But, he also stated that as much evidence as Claimant had of a disc problem such as herniation in 1996, he also had in 1994, which is to say that he has neither, based on the fact that he had no nerve root compression on his MRI at a time when he has the same pattern of symptoms. TX 51. On the 1996 MRI report, Dr. Tadduni stated that he is familiar with interpretations of lumbar MRI's. TX 52. He stated that in most radiological reading, focal central herniations that are not compressing nerve roots are a bulge, but in this reading, it is a herniation. TX 52.

Dr. Tadduni stated that he has treated other longshoremen from the Employer. TX 54. He believes that some of them might have had back problems. TX 55. Dr. Tadduni stated that his understanding of longshoremen duties involved lifting, pushing, pulling, bending, twisting. TX 55. Based on his four evaluations of the Claimant, Dr. Tadduni stated that Claimant can work within the restrictions set by him and he could likely return to his position as a longshorman, but he cannot state this within a

reasonable medical certainty.

Further, Dr. Tadduni stated that Claimant has low back pain and testicular pain complaints on each of the two occasions that he saw him, but at no point indicated that he had leg pain. TX 57. In 1996, Claimant complained of low back and testicular pain. TX 57. In 1997, Claimant complained of low back pain and testicular pain and proximal thigh pain. TX 57. In 2001, Claimant has low back, testicular, proximal thigh, and upper back and anterior chest pain. It is consistent that Claimant always complains of low back and testicle pain. In 1997, Claimant's symptoms are equal day and night. In 2000, Claimant's symptoms are equal day and night. Dr. Tadduni stated that symptoms from a muscoskeletal source such as disc herniation or degeneration should both be better at night. TX 59. Dr. Tadduni noted that this is pointed out only because he believes that Claimant is embellishing his complaints. TX 59.

Dr. Tadduni stated that he is aware of Dr. Grossinger's reported impression of the key assessment test as an abnormal study indicating moderate bilateral L5 and S1 radiculopathies. TX 63. Dr. Tadduni stated that he disagrees with this assessment because he does not think that Claimant has either the symptoms or the physical findings of an L5 radiculopathy. TX 64. Dr. Tadduni stated that he believes that if Dr. Grossinger felt that surgery was the next thing to consider, then that would be the next step, which would be to have him see an orthopedic surgeon or a neurosuergeon. TX 66. Dr. Tadduni stated that he does not know why this has not occurred. TX 67.

Dr. Tadduni stated that he does not believe that Claimant suffers from radiculopathy. TX 68. On his September 25, 2001 report, Dr. Tadduni stated that Claimant's reflexes were 1+ and equal at the ankles. TX 70. He believes that the fact that these types of reflexes are still present seven years after the accident is an argument against his having actually compressed nerve roots. TX 70. When Dr. Tadduni stated that Claimant was not fully recovered in his September 25, 2001 report, he meant that if you take Claimant's ongoing symptoms and his functional capacity evaluation and Dr. Lee's recommendations as saying if we give Claimant the benefit of the doubt and assume that there is some ongoing disability, then this is what he would recommend. TX 71. Although, he does believe that Claimant is fully recovered. TX 72. Dr. Tadduni stated that Claimant can push/pull any weight, but lifting weights greater than 20 pounds frequently is restricted. TX 73-74.

Finally, Dr. Tadduni stated that when he conducts an examination, he considers the history given by the patient, the patient's medical records, physical examination and any diagnostic tests that are available. TX 77. He stated that objective complaints are part of the physical exam and subjective complaints are part of the history. TX 77. Dr. Tadduni admitted to being fooled by a patient in the past into thinking that he suffered some believable ongoing restrictions. TX 81.

Vocational Testimony: Janet M. Dayhoff

Ms. Dayhoff testified that she has a Master's Degree in rehabilitation counseling from Virginia Commonwealth University in Richmond, VA and a Bachelor's degree from Loyola College in Baltimore, MD. TX 5. She has been in case management for approximately eighteen years; thirteen years with First Rehabilitation Resources, Inc., her current employer. She stated that she has certified rehabilitation counselor certification, and a certified case management certification. She further stated that she conducts medical and vocational case management services for worker's compensation, long-term disability, longshore cases and medical malpractice cases. TX 5.

She stated that she was involved in preparing the two labor market surveys in this matter dated May 11, 2002 and March 14, 2002. TX 6. She stated that she took information that was provided regarding the individual and identified appropriate job targets and then vacancies at the current time. Regarding the first report. she stated that she had a functional capacities evaluation dated August 19, 1997, physical reports from Dr. Tadduni dated 10/17/00 and 11/18/97 as well as the client's age, location, educational background and primary work history. TX 7. She stated that she found various emplyment positions for Clamant. These positions included parking lot attendant, hotel front desk clerk, janitorial cleaner, receptionist, food service worker, cashier, parts driver, locker room attendant, and security officer. TX 8. She stated that these were specific job classifications from the dictionary of Professional Titles. Further, she testified that she went on to find specific jobs within these classifications.

Regarding the report from March 14, 2002, she stated that she used additional information about the Claimant. This information included a report from Dr. Lee dated May 1, 2001, indicating a sedentary to light-duty work release. She testified that the positions that she identified as appropriate included security officer, telephone operator, tele-marketers, driver, dispatcher, and cashier. She subsequently went on to identify specific jobs within those classifications. She stated that in the first survey, the salary ranges varied from $6.50-$9.00/hour. TX 10. For the later survey, the compensation ranged from $5.15-$10.00/hour.

On cross-examination, Ms. Dayhoff testified that Allison Schweizer conducted the labor market survey with her immediate supervisor Annette Gallagher. TX 11. Her own role was stated to be that of doing a final review prior to submission. TX 11. She stated that Ms. Schweiker contacted the potential employers in this matter. The potential employer identified any appropriate vacancies, employee's restrictions, and any types of modifications that might be appropriate, as well as salary. TX 13. The distinctions between the May, 2001 report and the March, 2002 report were that the later report had more restrictive physical conditions. TX 13. With the first report, she stated that the contacts were made between April 23, 2001 and May 11, 2001. She did not know whether these positions were available before April, 2001 or whether they were

available today. TX 14.

She went on to testify that in finding appropriate jobs, they use a variety of methods, including the internet, yellow pages and classifieds. TX 15. She keeps it to 15-20 potential employers. TX 16. Then, someone from the office contacts the employer and relays the information about the individual, their physical needs and the type of employment. She stated that she usually finds out whether the position is available and whether the client is someone they might hire. TX 17. She stated that she was not aware of any potential employers that were contacted who stated that they would not hire the Claimant. She stated that such information is not noted in the reports. TX 18.

According to Ms. Dayhoff, full-time is forty hours a week and such information is noted in the report. TX 18. She also stated that it was not uncommon for a potential employer to withhold salary information. She stated that she was not aware of Claimant's previous employment as a security guard and his release for not being able to fulfill his duties. TX 20. She said that such information could affect his ability to perform jobs in the security industry. TX 20-21. She stated that she reviews 10-15 reports a week, and she conducts her own research on her own reports as well. TX 23. She believes that, although the Claimant's background is in physical labor, she does not feel as though that would prohibit a job such as hotel desk clerk. TX 24. She admits to not meeting the Claimant. TX 25.

Regarding the security positions, she stated that there are generally accommodations made in sitting/standing, depending on the site. Regarding the sites on the reports, she does not know whether the sites which stated $10/hour payment would allow for accommodations. TX 30. While sites paid varying salaries, she stated that most sites would make accommodations based on Claimant's physical limitations. TX 31. She stated that each firm varies in their pay scale and that she cannot say that the firms listed on the reports paid higher hourly wages if the employee was licensed to carry a weapon. TX 31-35. She believes that Claimant's realistic average starting salary would be $7.00/hour. She further stated that regarding the telecommunications jobs, employers would be looking for good communication skills, ability to record information, reliability, general employment skills and accountability. TX 38. Regarding background checks, she stated that each employers handles that differently. TX 39.

Prior experience was never a requirement on any of the listed positions. TX 44. She stated that the average salary in the report was $7.50/hour. She claims that she took the mid-range of each salary that was indicated and then averaged all the listed salaries. TX 46-48.

Medical Evidence

A. Dr. Peter Schatzberg

On May 14, 1996, Peter Schatzberg, D.C., wrote a report relative to Claimant. At that time, Claimant complained of severe low back pain, radiating down both legs to his right foot and behind his left knee. He also complaining of shooting pain down his back radiating into his lower abdominal area and into his testicles. Dr. Schatzberg made a diagnosis of subluxation of Claimant's lumbar spine, lumbar disc syndrome, lumbosacral radiculopathy, and acquired lumbosacral joint instability. He recommended a treatment modality of spinal manipulation daily for two weeks and three times per week until he achieves significant pain relief. At this time it was reported that Claimant was not taking any medicine and he had a previous right knee operation. Claimant was to be re-examined in two to four weeks. CX 05.

On June 13, 1996, another chiropractic report was sent by Dr. Schatzberg. Claimant again complained of constant low back pain radiating into both legs and shooting pain down his back radiating into his lower abdominal area and testicles. In spite of treatment, Claimant stated that he was experiencing weakness/numbness in the legs and feet. Standing, walking, sitting, lifting and bending remain difficult for him. At the same time, this condition interferes with his sleep, work and daily routine. X-rays of the lumbar spine revealed severe hypolordosis, left antalgia and asymmetrical facets. A recent MRI of the lumbar spine revealed a moderate sized L5-S1 disc herniation. At L4-5, there is a posterior disc herniation which effaces and compresses the anterior aspect of the thecal sac. Dr. Schatzberg stated that there was a weakness of the supportive soft tissue of the back giving rise to spinal instability and requiring continued treatment. CX 5.

B. Dr. Gregory T. Tadduni, M.D.

On May 28, 1996, a medical report was made by Gregory T. Tadduni, M.D. CX 8. Dr. Tadduni reported that he examined Claimant. Claimant stated he last worked light duty in May 1996. He complained of pain at L-5 and radiating to both testicles. Sneezing occasionally causes tension in the low back but not in his testicles. He reported that his symptoms are the same both day and night, which was somewhat unusual for a musculoskeletal source of back pain. Dr. Tadduni took a history of how the April 27, 1996 accident occurred as well as the treatment at Taylor Hospital Emergency Room. Claimant stated that he was told that he had "muscle spasms" although the records actually indicated muscle strain.

His past medical history included an open meniscectomy on his right knee in 1973. He denied any other medical problems and said he only visited the emergency room in the past for colds. The Doctor's examination revealed that he was well-nourished, in no acute distress, and able to get on and off the examining table without apparent difficulty. His gait was normal. There was no lumbar spasm with normal

standing and range of motion. Claimant complained of tenderness of the far lateral aspect of the iliac crest upon palpation, which the doctor felt was unusual. Lumbar range of motion was 95 degrees of flexion allowing him to touch his toes. Also, walking on toes and heels and carrying out squats were performed without complaint. The right knee demonstrated a healed incision without abnormality.

Dr. Tadduni reviewed the injury reports, medical reports and chiropractic notes and opined that Claimant had sustained a back strain, soft tissue injury that he expected to recover in a two to six week period. Relative to the complaints in the testicles, they could conceivably be a result of lumbar radiculopathy or a sacral nerve root impingement. Dr. Tadduni suggested that Claimant could perform modified duty while avoiding lifting more than 20 pounds frequently and 40 pounds occasionally. He also suggested that medical options be discussed upon the receipt of the MRI results. CX 8.

On June 20,1996, Claimant received a certified letter advising him that on Wednesday, June 19, 1996 he would be placed on the daily hire pursuant to Dr. Tadduni's restrictions of limited bending and no heavy lifting. CX 03.

On October 31, 1996, Dr. Tadduni issued another report relative to Claimant. EX 07. He analyzed the MRI report which indicated there was a disc herniation at L4-5 and L5-S1. He said that there was no mention as to whether the herniations are large enough to create nerve root compression. He wrote that the reading of the MRI was equivocal. He also questioned whether two herniations could possibly occur following the Claimant's bending over to pick up a line. He said that the description of the L5-S1 disc would imply that the findings are more than four weeks old, thereby suggesting that the abnormality predated Claimant's reported injury. Dr. Tadduni suggested active physical therapy, traction, or other passive treatment followed by a return to work.

On November 27, 1996, EX 08, Dr. Tadduni issued yet another report relative to Claimant. He summarized the additional records that were available from the Taylor Hospital Emergency Room indicating that Claimant was seen at that time for a chip fracture at the base of the distal phalanx of the right finger; x-rays were noted to show flexion at the dip with no fracture. Also, an E. R. record from 3/3/96 indicates that Claimant was seen for a chronic cough. Further, an E. R. record from 9/1/94 shows back pain and bilateral testicular pain for six weeks, with lower back pain radiating into the upper thighs and testicles. X-rays were read showing degenerative disc disease at L4-5 but no indication of spondylosis. Dr. Tadduni wrote:

> My impression is that the records are of great significance in two respects. First of all, the MRI indicates that the L5-S1 changes (including disc space narrowing) would have

> predated his April of '96 injury, since the disc space narrowing would not have occurred in this short period of time. The E.R. records form 1994 indicate that there was already degenerative change at L4-5 at that time as well. Thus, the MRI and x-ray findings taken together, indicate that he had previous degenerative disc disease at L4-5 and L5-S1, predating his April '96 injury. This would indicate that, although he complained of symptoms in April '96, no significant weight should be placed on the MRI changes as being substantiation that he sustained an injury at that time. A second point I would make is that the MRI does not provide any evidence of nerve root compression, which was a main consideration in my impression section of my May '96 report ... I would also say that there is nothing here to indicate that this patient's testicular pain is related to his low back. The final, perhaps most significant, point with regard to the medical records is that they indicate that the patient presented with essentially identical symptoms (low back pain radiating to his testicles) in 1994. At that time, he was not reporting it as a work injury. In 1996, he told me that he had never injured his back or had problems with his back prior to the 1996 injury. Clearly that was a lie. The fact that he had enough problems in 1994 to have presented to the Emergency Room and had x-rays of his back would indicate that he had symptoms at that time of significance, although it was not reported as a work related injury at that time.

Therefore, Dr. Tadduni opined that Claimant was not being forthright; this conclusion was supported by some of his responses on examination. Dr. Tadduni subsequently called Claimant's subjective complaints into "significant question." The only normality in this patient's clinical picture, other than his long standing x-ray finding are his subjective complaints and his subjective history. The doctor questioned whether the history of having the onset of back problems in April of '96 was creditable. He opined that Claimant should be returned to his regular work without restriction.

On May 8, 1997, Dr. Tadduni issued a report of an examination of Claimant. EX 12. This was the doctor's third physical examination. He listed a brief history, stating that Claimant's present complaints were pain in the low back, pain in the testicles, and pain in both legs. Sneezing also caused pain in the right flank and low back. Claimant stated that he was receiving physical therapy three times per week since 1/8/97, under

Dr. Grossman's care. He denied any previous injury to his low back prior to 1996.[3] Dr. Tadduni reported that Claimant took no medicines, sat unsupported on the examining table, and moved on and off the examining table without difficulty. His lumbar spine showed normal lordosis without spasm and there was no tenderness in the low back. Claimant's gait was normal, including walking on toes and heels and carrying out squats; straight leg raising on the left was negative, and on the right caused complaint to the right low back; lower extremity strength and sensation were normal.

Dr. Tadduni reviewed the medical records from Dr. Grossman's office dated 6/4/96, 12/12/96 and 1/15/97. He opined that Claimant's pattern of complaint varied significantly throughout the medical record. His physical examination was different than reported to Dr. Grossinger. Dr. Tadduni did not find evidence of back spasms, limitation of motion, or decrease in the ankle jerk reflexes. He wrote that he found symptom magnification, with no weakness in L5 or S1 distribution. Based upon his examinations and review of the records, Dr. Tadduni found that Claimant does not have evidence of ongoing lumbar radiculopathy. He stated that it may be that none of the MRI findings relate to the alleged accident of 1996 because the patient had similar symptoms in 1994. He found Claimant to be exaggerating his symptoms and that his complaints do not render him totally disabled.

On September 25, 2001, Dr. Tadduni reported that he had seen Claimant on 5/28/96, 5/8/97 and 10/17/00. EX 30. The patient's history now included horizontal and vertical pain, pain in his testicles every other day, and occasional pain in the upper posterior thighs and lower back. The doctor's physical examination revealed that he was able to sit unsupported on the examining table, moving on and off with difficulty. His posture was erect and symmetrical while the thoracic spine was normal. Straight leg raise tests on the right caused complaint of low back pain and on the left were negative. Claimant sat up with his hips flexed to 90 degrees, his knees extended and lying on the examining table for four minutes while talking to the doctor. The doctor opined that this was inconsistent with complaints that he voiced and sitting root tests and straight leg raises. Instead, he would have been expected to immediately hang his legs over the table. Nevertheless, Dr. Tadduni wrote that Claimant is clearly not recovered. However, he did not believe that Claimant had ongoing reticular symptoms, and that he could function at the work level outlined in his 1997 functional capacity. Dr. Tadduni once again stated that his diagnosis is lumbar degenerative disc disease which predates the 1996 injury. The doctor believes that Claimant has reached maximal medical improvement; he did not believe Claimant had lumbar radiculopathy.

C. Dr. Steven B. Gilman

---

[3] As mentioned, *supra*, Claimant had previous treatment in 1994 for similar injuries.

A May 29, 1996 MRI was reported by Steven B. Gilman, M.D. CX 09. He stated that findings demonstrated a moderate sized L4-S1 herniation which abuts the anterior aspect of the thecal sac. No evidence of degenerate bony spondylosis is seen at this level. At L4-5 there is a posterior disc herniation which effaces and compresses the anterior aspect of the thecal sac.

D. Dr. Bruce H. Grossinger, D.O.

On June 4, 1996, the results of an EMG were reported. CX 10. The EMG was summarized as abnormal, indicating moderate bilateral L5 and S1 radiculopathies, and was signed by Bruce H. Grossinger, D.O. Dr. Grossinger wrote a follow-up stating that the abnormality was due to Claimant's work related accident. CX 11,12.

On December 12, 1996, CX 23, an office note was written by Dr. Grossinger to encourage the company to allow additional treatment. Dr. Grossinger again wrote:

> It is my opinion, that [Claimant's] work injury of 4/27/96 directly gave rise to his condition, as his past medical history is essentially negative for significant spinal injury.

He also wrote that there was no evidence of symptom magnification or embellishment, and that Claimant's medical history is essentially negative for significant spinal injury. He further stated that Claimant was forced back to work in July, then harassed and finally fired. He said that it was his hope that he could, with appropriate treatment, return to moderate duty and he urged Claimant's claim to be reopened.

On January 15, 1997, Dr. Grossinger wrote that Claimant had two herniated discs at L4-5 and L5-S1 with impingement. He outlined a course of treatment to include up to three epidural steroidal injections, and a program of aqua-therapy. CX 13.

On January 20, 1997, CX 22, a physical therapy evaluation was issued by Dynamic Physical Therapy upon referral by Dr. Grossinger. They reported that he has an onset of cervical symptoms, and that he had returned to work in July on light duty and that he was out of work since 11/2/96. The history was not correct. Upon testing, straight leg raising was negative on the right and positive on the left lower extremity at 40 degrees. They subsequently set treatment goals.

On January 30 and February 15, 1997, CX 21, Dr. Haughey wrote a report to Dr. Grossinger that he had performed a lumbar epidural steroid injection on Claimant.

On January 16, 1998, CX 19, Dr. Grossinger issued another report. Claimant again told the doctor that he had continued radiating low back pain into his legs, thighs and groin. The doctor reported that straight leg raising and sitting root signs were

positive to 70 degrees bilaterally. Dr. Grossinger repeated, based upon the information that Claimant had previously given him, that his condition was related to his work related accident of April 27, 1996.[4] The doctor suggested a home physical therapy treatment.

On June 9, 1998 Dr. Grossinger wrote an office note. CX15. At that time, the doctor reported that Claimant abstains form yard work and house cleaning. Dr. Grossinger indicated that there was no evidence of symptom magnification or embellishment; Claimant has permanent injuries which include but are not limited to lumbosacral radiculopathy, lumbar strain, sacroiliac dysfunction as well as two herniated discs with impingement at L4-5 and L5-S1.

On August 4, 1998 Dr. Grossinger issued a report stating that Claimant continued to experience low back pain, now intensifying into his legs and feet. CX 14. He noted some compensatory neck stiffness and right arm numbness. He will continue on home physical therapy.

On March 9, 2000, CX 17, Dr. Grossinger wrote that Claimant had serious and permanent injuries, multiple traumatic herniated discs in the lumbar distributors and lumbar strain sacroiliac dysfunction with gait disturbance. He sent Claimant back for physical therapy.

E. Atlantic Health Group

On September 9, 1997, EX 15, the Atlantic Health Group performed a functional Capacity Evaluation of Claimant. The stated goal was to, (1) qualify the safe functional capacities, (2) quantify the musculoskeletal impairment of the client, (3) assess the client's voluntary effort and identify the problems with consistency of effort or aberrant illness behavior, (4) compare the physical capacities of the client to the physical demands of the job, (5) identify the needs for any further physical therapy treatments, (6) identify the need for any possible reasonable accommodations or job design changes. Claimant gave a history of working at Penn Terminals lifting light weight to over 100 pounds. Claimant stated that he injured his back while lifting cables on April 26, 1997 (in a bent over position). Claimant stated that he has had significant sharp pain in his back and into the posterior regions since the accident. The subsequent report stated that Claimant's MRI was positive for a herniation at the L4-5 level in addition to a positive EMG for nerve damage. Further, it rated Claimant's low back pain 0-8/10 with low back pain across his lumbosacral region with intermittent radiating symptoms into the posterior aspect of both thighs and into his testicles. Claimant's treatment to this time included two cortisone injections, four months of chiropractor care

[4] Claimant did not inform Dr. Grossinger of his previous treatment in 1994, as described by Dr. Tadduni, *supra*.

and sixteen months of physical therapy.

In his history given at the Atlantic health Group, Claimant also stated that he lives in a two story home with his family and his bedroom is upstairs. He admitted that he had a full time job with a security company where his sits for approximately eight hours and walks 100 feet every hour. Claimant was asked to diagram his pain. He said that it was an achy pain in the thoracic to lumbar regions with occasional stabbing pain into the posterior aspects of both thighs and into his testicles, rating a maximum of 8/10, and minimum or 0/10. They opined that this was consistent with the other findings. They also opined that Claimant's composite rating for the Oswestry Scale was 20, which placed him in the moderate category. According to this group, a moderate disability person experiences more pain with sitting, lifting and standing. Travel and social life are difficult and personal care, sexual activity and sleeping are not grossly affected. Further, the back condition can usually be managed by conservative means.

Using the physical demand characteristics set forth by the U. S. Department of Labor relative to deep squatting, bending over, and reaching overhead, Claimant was able to perform the three tasks followed by ten more repetitions. He was evaluated for sitting, which he did for one hour followed by standing up and changing position. He was able to stand for 15 minutes in one place and could sort for 1 ½ hours; Claimant chose to sit and rest 3-4 times between various tasks. He was able to walk for 9 minutes (.35 miles) at a speed of 2.3 miles per hour; he felt that he could have walked further at a slower speed. He demonstrated he could lift, floor to waist, a maximum of 56 pounds repetitively; waist to shoulder lifting was 36 pounds maximum, 31 pounds repetitively; shoulder to over head was a maximum 41 pounds, repetitively 26 pounds. He could perform an isometric push in a upright position of 111lbs, and the maximum pull was 170lbs. The heart rate (pre physical capacity evaluation) was 90 beats per minute; post physical capacity evaluation, Claimant's heart rate was100/bpm. Claimant complained of back pain but was able to perform all tasks requested of him. It was reported that he demonstrated an ability to work at the medium physical demand level as described by the U. S. Department of Labor. These tests were objectively found to be valid. He should not lift more that 50lbs from the floor to waist, 35lbs waist to shoulder or overhead over 40lbs. His push/pull activities should be restricted to 100lbs. He was found to be able to perform most activities that require general agility, occasionally lifting and walking, avoiding prolonged standing in one place.

F. Dr. Bong S. Lee, M.D.

On May 1, 2001, CX 18, Claimant was examined at the request of the Administrative Law Judge by an independent medical examiner, Dr. Bong S. Lee. The history given to Dr. Lee resembled that previously given to other physicians: Claimant sustained an injury to his low back while picking up heavy rope on his job, subsequently Claimant experienced pain and burning sensations to the thighs and testicles. Claimant

then indicated treatment with Dr. Schatzberg and Dr. Grossinger. He received two epidural blocks at Memorial Hospital, but in light of the insurance company denying payments after five months, Claimant has been taking Motrin, Tylenol and Durocet, instead of receiving treatment. Claimant worked as a security guard in 1997 and 1998 but was unable to handle working for more than 5 months each time. In addition to his previous complaints, Claimant now stated that he felt out of shape and was having difficulty getting out of bed in the morning and using the toilet. The doctor's examination revealed that he was well developed, well nourished, and in no acute distress. He was 5'11" and 290 pounds but claimed that he gained 60 pounds since the injury. The curvature of the lumbosacral spine was normal. Forward bending was performed cautiously and the curve was reversed fully, but a complaint of pain was elicited at the extreme of this motion. The return to the upright position was well performed; lateral bending to each side showed no segmental restriction of motion but the patient complained of discomfort at the extreme of this motion. The muscles were taut but not in true spasm, they could be relaxed by alternately raising the knees in front of the abdomen. In the prone position, both lower extremities were symmetrical with no deformity. There was no gross atrophy for swelling of thighs, calves or feet. All major articulations were of normal configuration, and Claimant had a full range of motion with no complaint of pain. There was no joint swelling, instability or sensory deficit; all deep tendon reflexes of the knees and ankles were present and symmetrical bilaterally.

The straight leg raising test elicited a complaint of pain beyond 60 degrees of elevation of the legs.

After his review of the medical evidence, Dr. Lee opined that in view of the lack of a history of pre-existing condition and on the basis of the medical records, Claimant had not achieved maximal medical benefit and required rehab, loss of weight, oral medication and perhaps epidural injections. He stated that Claimant would be able to return to sedentary work and light duty work with restrictions of lifting more than 20 pounds, repetitive bending or long standing, walking or climbing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.,* 390 U.S. *459* (1968), *reh'g denied,* 391 U.S. 929 (1969); *Todd Shipyards v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Inc.,* 22 BRBS 164, 165, 167 (1989); *Anderson v. Dresser Guiberson Pumping,* 22 BRBS 20, 22 (1989); *Hughes v. Bethlehem Steel Corp.,* 17 BRBS 153 *(1985); Seaman v. Jacksonville Shipyards, Inc.,* 14 BRBS 148, 149 (1981); *Brandt v. Avondale Shipyards, Inc.,* 8 BRBS 698 (1978); *Sargent v. Matson Terminal, Inc.,* 8 BRBS 564 (1978).

1. Average Weekly Wage

The method for determining average weekly wage (AWW) is set forth in Section 10, which provides several alternative methods for determining annual earnings. *See* 33 U.S.C. §910. The calculation is directed toward establishing Claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). In this matter, Claimant argues that the Employer has underestimated Claimant's AWW at $489.63, with a corresponding compensation rate of $326.42. In response to this argument, Employer states that the parties have previously agreed to the AWW numerous times.[5] As such, the Employer argues that if I were to allow reconsideration of this issue now, Employer would be subject to tremendous prejudice.

With these arguments in mind, I hold that the Claimant's average weekly wage has been stipulated to as recently as the March 18, 2002 hearing in this matter. This stipulation shall stand as the Claimant's AWW because, in addition to being previously stipulated, this figure is consistent with Section 10(c). An ALJ can rely on a voluntary stipulation as to average weekly wage which is based on a reasonable method of calculation under the Act. The judge is not bound to accept the stipulation where the law has been incorrectly applied. *See Duncan v. Washington Metro Area Transit Auth.,* 24 BRBS 133 (1990). Calculations under sections 10(a) and 10(b) are similar in that they both apply to employment that is permanent and continuous rather than seasonal and intermittent. *See Duncanson-Harrelson Co. v. Director, OWCP*, 686 F2d 1336, 1342 (9th Cir. 1982), *vacated in part on other grounds*, 462 U.S. 1101 (1983). In this matter, there has been ample testimony that Claimant does not have a set schedule. That is, he is listed for employment based on a seniority basis. Should there not be enough work to go around on a particular day, then Claimant would not work that day. On the other hand, Section 10(a) presupposes that work would be available to the Claimant each day. Similarly, Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole of the year prior to his injury. *See Duncan*, 24 BRBS at 136. Since Employer never made this guarantee of daily work, Sections 10(a) and 10(b) cannot be applied to calculate Claimant's AWW. *See Gilliam v. Addison Crane Co.*, 21 BRBS 91, 92 (1987) (Section 10(c) was properly applied where bad weather conditions had caused work to be available to Claimant only on intermittent basis). In order to properly calculate AWW in this matter, Section 10(c) is applicable.

Section 10(c) is used in situations where the claimant's employment is seasonal, part-time, intermittent or discontinuous. *Mattera v. M/V Mary Antoinette Pac. King, Inc.*,

---

[5]Although the Employer submitted his response to Claimant's AWW arguments on June 21, 2002, I will allow this argument to be considered.

20 BRBS 43, 45 (1987) (claimant only worked when fishing boats were in the harbor). Also, the objective of Section 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of the injury. *See Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). Unlike sections 10(a) and 10(b), subsection (c) contains no requirement that the previous earnings considered be within the year immediately preceding the injury. Instead, the ALJ may consider: the actual earnings of the claimant at the time of injury; the average annual earnings of others; the earning pattern of the Claimant over a period of years prior to the injury; the claimant's typical wage rate multiplied by a time variable; all sources of income including earnings from other employment in the year preceding injury, overtime, vacation or holiday pay, and commission; the probable future earnings of the claimant; or any fair and reasonable alternative. Therefore, the statutes make it very clear that the ALJ has broad discretion in determining annual earning capacity under section 10(c). *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 105 (1991).

Claimant stated in his closing brief that the AWW stipulated to in this matter was $489.63 and that this amount was calculated based on claimant's earnings in the 52 week period immediately pre-ceding his injury. In an effort to change this finding, Claimant argues that a more appropriate calculation would be determined by using Claimant's wages earned for the 17 weeks prior to Claimant's date of injury (1/1/1996 - 4/28/1996) totaling $13,710 and extending this number over the course of a 52 week period. This gives an AWW of $806.47, with a corresponding compensation rate of $537.65. However, I cannot see Claimant's rationale for using this number as being more accurate that the actual wages earned over the course of 52 weeks prior to Claimant's injury. Claimant argues that his higher AWW more accurately reflects earning potential at the time of injury. I disagree. If anything, Claimant's calculations allow for the benefit of Claimant's higher wage earnings by simply using a more favorable time period and approximating it over the course of a full year. I do not find this method to be more accurate and the Claimant does not prove that his calculations are more accurate and reasonable. Therefore, I hold that Claimant's AWW remains the $489.63, compensation rate $326.42.

I must also note that the statutes call for a fair and reasonable conclusion when calculating AWW, especially in using Section 10(c). Therefore, Employer's argument that he would be subject to tremendous prejudice should AWW be re-litigated carries a limited amount of weight. Claimant is within his discretion to argue for reconsideration of AWW. However, Employer's points are valid in that AWW has been stipulated to in the past by Claimant's previous attorneys, that the March 7, 2002 Pre-Hearing report makes no mention of AWW as an issue, and that Employer's counsel's statement during the hearing on March 18, 2002 that Claimant's AWW was $489.63 went without objection. I find that Employer's objections based on prejudice should be, and have been, duly noted.

2. Nature and Extent of Disability

An injured worker's impairment may be found to be permanent rather than temporary under either of two tests. *See Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120, 122-123 (1988). Under the first test, a residual disability, partial or total, will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement (MMI). *See James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). Under the second test, a disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 95th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). In this matter, Claimant's back condition has persisted for six years and various physicians have testified to the fact that it will not significantly improve. In his deposition, Dr. Tadduni stated that Claimant has reached MMI. *See* Tadduni Dep. at 19. Further, Dr. Lee has testified that Claimant's condition is likely to worsen rather than improve. *See* Lee Dep. at 21-24. According to Dr. Grossinger, Claimant has serious and permanent injuries, which include multiple traumatic herniated discs in the lumbar distributions, lumbar strain, sacroiliac dysfunction and gait disturbance. CX 17. As summarized above, Dr. Grossinger has placed Claimant on work restrictions, including weight lifting restrictions and sit/stand restrictions. CX 16. Therefore, I credit the aforementioned doctors' findings that Claimant's restrictions render him permanently disabled.

However, the real crux of this case turns on a determination of the extent of Claimant's disability. "Disability" under the Act means incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment. 33 U.S.C. §902(10). As stated above, I hold that the Claimant has established a prima facie case for disability by showing that he cannot return to his regular or usual employment due to his work-related injury. Employer, in turn, is now responsible for proving the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions and which he could secure if he diligently tried. In its initial response to this requirement, Employer argued that if the Claimant had not been terminated because of insubordination, he would still be working for Employer today. Therefore, Employer argues that it has satisfied its burden of showing suitable alternative employment. However, an employer cannot simply show that a claimant was terminated for cause in order to prove suitable alternative employment. *See Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227 (4th Cir. 2001). The Employer has the burden of showing that there was suitable alternative employment, either within or without the company. However, suitable alternative employment may be unavailable to a claimant if the employer finds out that the claimant violated company rules. *See Harrod v. Newport News Shipbuilding and Dry Dock Co.*, 12 BRBS 10, 14-16 (1980) (employer met burden by showing

alternative job given claimant, even though claimant was later fired for violating a company rule against bringing handguns to work). In this matter, Claimant was terminated for insubordination. Testimony by Claimant's supervisor revealed that Claimant was told to work in a certain manner while performing the cord watcher position and he did not act as such. Therefore, Claimant was terminated.

Even in light of the fact that Claimant was terminated for reasons not related to his work injury, I hold that Employer remains liable until suitable alternative employment is adequately proven. Unlike the situation in *Harrod*, Claimant did not violate a stated company policy, such as carrying a handgun. According to McTaggart's testimony, Claimant and he disagreed on the proper way to perform an aspect of his job. Whereas the employer in *Harrod* had a legitimate tangible reason to terminate the claimant, the reasons surrounding termination here are less tangible and open to various interpretations. Holding that an employer may terminate disabled employees and avoid liability based on such an abstract situation such as this would surely allow for abuses of this rule. Employers would have ample leeway in terminating disabled employees while also escaping liability in the process. I cannot allow for this to occur. Therefore, as this case is distinguishable from *Harrod*, I find that the Employer must show suitable alternative employment in order to properly avoid liability.

Therefore, I will turn to the remaining evidence regarding suitable alternative employment both within the company prior to termination and without the company post-termination. Prior to termination, Employer provided Claimant with three types of modified duty assignments: yard truck driver, cord watcher and lunch room cleaner. The yard truck driver position violated restrictions placed on the Claimant in light of his work-related injury. Alternate employment cannot include jobs that are physically incompatible with Claimant's post-injury status. *See Bumble Bee Seafoods v. Director OWCP*, 29 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). Testimony by Patrick McTaggart, front-line supervisor of marine operations with Employer, yielded a description of the position involving extensive bouncing around in the cab while moving cargo between warehouses. TX 82-84. Both Dr. Lee and Dr. Tadduni agree that Claimant should not be operating a yard truck. Lee Dep. at 26; Tadduni Dep. at 74. Therefore, the yard truck position cannot be considered suitable alternative employment.

Claimant also worked as a cord watcher following his injury. This job involved watching the power cord from a crane so that the crane does not run over and sever the cord. Also by McTaggart's admission, these positions were limited, Employer did not specifically hire individuals for this position, and there has not been someone hired for this position in over three years. TX 76-80. Therefore, it is clear that Employer no longer hires for this position. In order for a job to constitute suitable alternative employment, the job must be actually available. *See Wilson v. Dravo Corp.*, 22 BRBS 463 (1989). The final job made available by Employer, post-injury, was lunch room

cleaner. Yet, the same factors which plagued the cord watcher position applied here as well: the position was sporadic and not specifically filled with non-restricted employees. In conclusion, I hold that the positions made available to Claimant post-injury by the Employer were not suitable alternative employment and that Employer has failed to meet its burden in this regard.

With Employer not providing suitable alternative positions, the Employer must then prove the availability of alternative employment outside of the company and in the local community so as to avoid liability for compensation payments. Employer has supplied two labor market surveys: May 2001 and March 2002.[6] Without commenting on the intrinsic value and credibility of these surveys, neither survey can support a finding of suitable alternative employment for the years 1996-2000. Labor market surveys only represent the availability of certain positions on or about the date of the surveys. Janet Dayhoff, a vocational rehabilitation specialist, specifically testified that the surveys do not represent that the positions were available at any time earlier than the dates they conducted the survey. Dayhoff Dep. at 14, 49-50. Therefore, the surveys cannot establish the availability of suitable alterative employment in 1996, 1997, 1998, 1999 or 2000.

Nevertheless, in 1997, Claimant spent several days working a variety of jobs. Further, he spent an extended time working a security position with White Marsh Security Services from May - November 1997. The chart below lists Claimant's employment from April 1997 - March 1998:

EMPLOYER	**DATES OF EMPLOYMENT**	**EARNINGS**
Elwyn, Inc. (EX 31)	4/7/97 - 4/17/97	$208.32
White Marsh Security (EX 14)	5/19/97 - 9/12/97	$2,823.90
Foulkes Associates (EX 17)	10/31/97 - 12/27/97 01/01/97 - 2/28/98	$1572.80 $1365.00

[6] Janet M. Dayhoff, vocational rehabilitation specialist, testified that she helped develop both of the aforementioned surveys and explained the methodologies used in completing them. EX 38. Given her experience and methods employed to prepare the labor market survey, I find that the results are reliable and sound. Also lending the surveys considerable weight is the fact that Dr. Tadduni also approved of the positions. Dr. Tadduni examined the Claimant on four occasions and agreed with Dr. Lee regarding the positions on the 2001 survey and again approved all of the positions in the 2002 survey with the exception of the light duty driving. EX 37.

Jeffrey Miller Catering (CX 27)	1997 (exact date unknown)	$50.75
Day & Zimmerman (EX 32)	1997 (exact date unknown)	$91.85

However, Claimant held his position at Foulke for four straight months, while holding a similar security position with White Marsh for the immediately preceding four months. One would be hard-pressed to accurately describe these positions as sporadic, unsuccessful attempts at employment. *E.g. see Edwards v. Director*, OWCP, 999 F.3d 1374, 1375, 27 BRBS 81, 83 (CRT) (9th Cir. 1993). Yet, Claimant continues to argue that these positions ended in his termination resulting from his inability to perform the job as a result of his injury. However, the only evidence supporting this position is Claimant's own testimony of the job duties and Dr. Lee's restrictions on long periods of standing, walking and climbing. In light of Claimant's lacking credibility, *see infra*, I cannot allow his testimony any weight. Considering the fact that Claimant's testimony is the only source of evidence regarding job descriptions for these positions, I cannot believe that he was terminated without any attempts at modifying the position so as to fit within his medical restrictions.[7] Therefore, I hold that Claimant's eight month period of employment post-injury exemplifies suitable alternative employment from April, 1997 until March, 1998.

For the period between March, 1998 and the first labor market survey in May, 2000, employer has not submitted any evidence regarding suitable alternative employment. In order to provide realistic job opportunities, the employer bears the burden of establishing their precise nature, terms and availability. *See Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). Without such evidence covering this 26 month period, I am only left to assume that suitable alternative employment has not been proven for this period.[8]

Regarding 2001 to the present, Employer has produced a May, 2001 and March, 2002 labor market survey listing jobs available to the Claimant during their respective time periods. The May, 2001, survey was reviewed by Dr. Lee and in his report of July 10, 2001 he approved six of the nine jobs identified in the survey. EX 27; EX 36 at 14. The five jobs approved by Dr. Lee were:

---

[7] Additionally, Claimant's own testimony was that he was terminated for sleeping while on the job. I do not credit his testimony. I note that none of the testifying physicians in this matter have placed medical restrictions on him which would result in any type of sleep disorder.

[8] However, Claimant is not entitled to any benefits for the period as a result of his forfeiture of benefits under Section 908. *See infra* Issue 3: Forfeiture of benefits Under Section 908(j).

JOB TITLE	EMPLOYER/LOCATION	RATE OF PAY
Hotel Front Desk Clerk	Cherrytree Hotel Fort Washington, PA	$9.00/hour
Receptionist/Greeter	Bryner Chevrolet Jenkintown, PA	Not disclosed
Cashier	Wood Dining Services Allentown, PA	$7.50 - $8.50/hour
Cashier	Metro Chrysler Philadelphia, PA	$6.50 - $7.00/hour
Locker Room Attendant	Merion Cricket Club Haverford, PA	Not disclosed
Security Guard	Firm Security Services Philadelphia, PA	$7.00

EX 26. Of these approved positions, two of them did not reveal salary information. Employer must identify the terms of employment in order for such position to be considered as suitable alternative employment. *See Thompson v. Lockheed Shipbuilding and Constr. Co.*, 21 BRBS 94, 97 (1988). Claimant argues that the remaining security position should not be considered because Claimant was terminated from his last two security positions due to his inability to perform the duties for the job. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 97 (1991). However, the only evidence as to Claimant's termination and the reasons for it remain his own testimony. I cannot credit his testimony with much value. Claimant has repeatedly neglected to return LS-200's after telling me that he would, he has undervalued earnings on this form, he has lied about information regarding this form and he has lied to his various examining physicians regarding any previous injuries to his back.[9] In light of these facts, his testimony carries little weight. Therefore, I hold that the security position listed as a suitable alternative by the Employer shall be considered. Yet, I agree with the Claimant in dismissing the position available in Allentown, PA, as a suitable alternative. Allentown is approximately 66 miles from Claimant's home. This distance is simply unreasonably long to expect one to travel for a position at the given rate of pay. *See Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M. Drilling Co. v. Marshall*, 577 F. 2d 1003, 8 BRBS 658 (5th Cir. 1978).

The remaining positions are suitable alternative employment options for the

[9] *See supra*, Dr. Tadduni's November 27, 1996 Report, EX 8.

Claimant. In making this determination, the ALJ must use common sense and experience in evaluating whether claimant would likely be hired for a job given the claimant's age, physical impairment, work experience, education and such other factors as may be relevant. Claimant wishes for me to immediately dismiss the remaining positions because two of them add additional stated requirements of "good customer service skills very important", EX 26, and "prefer experience", EX 26. If I were to dismiss every position which listed these generic and often times dismissed additions to job listings, there would never be a suitable alternative position. These phrases are often times used, but more often ignored when making a final hiring decision.[10] Therefore, I find that the remaining positions in the May, 2001 labor market survey acceptable in proving suitable alternative employment. The average of the positions approved by Dr. Lee and acceptable under the standards listed above paid $7.67 per hour or a total of $306.80/week. This figure leaves Claimant with a loss of wage-earning capacity of $182.83/week, and a compensation rate of $121.89/week for the period covered by the May, 2001 labor market survey.

Employer's second labor market survey was completed in March, 2002. EX 34. This labor market survey revealed the following additional employment opportunities for Claimant:

JOB TITLE	EMPLOYER/LOCATION	RATE OF PAY
Security Guard	Contemporary Services Philadelphia, PA	$6.00/hour
Security Guard	Protection Technolkogy Philadelphia, PA	$6.50 - $10.00/hour
Security Guard	Scotland Yard Philadelphia, PA	$5.15 - $10.50/hour
Security Guard	Sheppard Detective	$5.15/hour
Telephone Operator	Ansercom Bensalem, PA	$6.25/hour
Telephone Operator	Newton Answering Svc. Langhorne, PA	$7.00 - $8.50/hour
Telemarketer	Alternative Health Concepts Southampton, PA	$8.00/hour

[10] Although given little weight in making my decision, I also note that Claimant testified that he worked as a cashier in the past.

Light Duty Driver	76 Carriage Philadelphia, PA	40% of gross
Light Duty Driver	A-C Repro. Philadelphia, PA	Piecework
Dispatcher	Yellow Cab Philadelphia, PA	$5.15/hour
Dispatcher	Old City Taxi Philadelphia, PA	$6.50/hour
Dispatcher	Metro Mobility Philadelphia, PA	$6.50/hour
Dispatcher	Northeast Taxi Philadelphia, PA	$5.15/hour
Cashier	7-Eleven Philadelphia, PA	$6.50/hour
Cashier	A-Plus Mini Market Philadelphia, PA	$5.15/hour

EX. 34. Dr. Lee once again approved all of the jobs listed on this survey. EX 36. However, the positions which do not offer an actual dollar amount in remuneration once again do not qualify. *See Thompson, supra.* Yet, the remaining positions do provide suitable alternative employment options for the Claimant and I approve them here. This survey shows an average salary of approximately $6.77/hour or $270.80/week, with a corresponding compensation rate of $144.89/week for the period covered by the March, 2002 labor market survey[11].

3. Forfeiture of Benefits Under Section 908(j)

[11]Claimant argues that since Employer did not assign Claimant to an available clerical modified duty position, TX 76, Employer apparently did not believe Claimant was qualified for such positions. Therefore, Claimant argues that the Employer should now be held to the same standards when evaluating the jobs that Employer now proposes as suitable alternative employment. Although a creative argument, I cannot agree with its propositions. Firstly, Employer never testified to such a belief in Claimant's clerical abilities. Therefore, Claimant's argument is based on his own speculation. Secondly, nowhere in the statutes and regulations governing this matter does it state that suitable alternative employment proven by a labor market survey must be in agreement with Employer's hiring standards.

As enumerated in 33 U.S.C. §908(j), an employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self employment, on such forms as the Secretary shall specify in regulations[12]. *See* 33 U.S.C. §908(j)(1). An employee who fails to report the employee's earnings under paragraph (1) when requested, or knowingly and willfully omits or understates any part of such earnings, forfeits his right to compensation with respect to any period during which the employee was required to file such report. *See* 33 U.S.C. §908(j)(2). At the same time, compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the deputy commissioner. *See* 33 U.S.C. §908(j)(3). The form designated as the Report of Earnings is the LS-200; a claimant is required to complete and return the form in accordance with these statutes.

In this matter, Claimant completed and returned two LS-200's. The first form covers the period between January 1, 1997 and January 21, 1998. EX 18. The chart below indicates earnings, as presented in the evidence, for the same period. However, the last column indicates whether or not these earnings were recorded on Claimant's LS-200 covering this period.

EMPLOYER	**DATES OF EMPLOYMENT**	**EARNINGS**	**REPORTED ON LS-200?**
Elwyn, Inc. (EX 31)	4/7/97 - 4/17/97	$208.32	No
White Marsh Security (EX 14)	5/19/97 - 9/12/97	$2,823.90	No
Foulkes Associates (EX 17)	10/31/97 - 12/27/97 01/01/97 - 2/28/98	$1572.80 $1365.00	Partially
Jeffrey Miller Catering (CX 27)	1997 (exact date unknown)	$50.75	No
Day & Zimmerman (EX 32)	1997 (exact date unknown)	$91.85	No

[12] Those regulations are found at 20 C.F.R. §706.286. Claimant argued that Employer has not followed proper procedure in making this argument, as none of these charges were filed with the District Director, as enumerated by the regulations. However, Administrative Law Judges are authorized to directly consider forfeiture requests under the Act and corresponding Regulations. *See Hundley v. Newport News Shipbuilding & Dry Dock Company*, 32 BRBS 254, n. 2 (1988).

Although Claimant reported earnings from Foulke Associates, Inc., he underreported these earnings by $787.80. In addition, Claimant simply did not report any of the remaining earnings within that time period. Nevertheless, Claimant testified to working at each of these positions. Claimant argues that he later produced the missing information during his deposition, CX 28, and that Employer was not prejudiced by this action since he waited until four years later to raise the issue. I find this argument completely meritless. The statutes governing the LS-200 and its instructions are very clear. Later deposition testimony cannot cure the fact that the Claimant underreported his earnings in an effort to deceive the court and obtain a larger reward. The timing of these allegations bear no effect on the fact that they occurred. Therefore, I find that the forfeiture provision of Section 908(j)(2)(B) should be applied for this period, thereby not entitling the Claimant to benefits for this period.

On August 6, 1999, Employer sent a request for a second LS-200 requesting that Claimant document his earnings from January 22, 1998 to the present. EX 23. This correspondence and LS-200 were sent and signed for via certified mail. During his testimony, Claimant admitted that he received this letter and the LS-200 enclosed with it. TX 3/18/02 at 47. At the June 27, 2000 hearing, Employer asserted its entitlement to have the LS-200 completed and returned. TR 6/17/00 at 13-15 & 33-34. However, at the hearing on September 7, 2000, Claimant denied that he had ever received the LS-200 or was asked to complete it. TX 9/7/00 at 6-7,10. Giving Claimant the benefit of the doubt, I even provided him a self-addressed, stamped envelope to facilitate the prompt return of the form. TX 9/7/00 at 18. The issue regarding the LS-200 extended into hearings on May 15, 2001 (TX 5) and August 2, 2001 (TX 6-7), still without resolution. Not until October 15, 2001 (EX 30) did Claimant finally complete the form. Thus, I find that the forfeiture period ended on that date. *See Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997). Claimant has thereby forfeited, under Section 908(j), any and all benefits that may be awarded to him as a result of this injury for the period between January 1, 1997 and October 15, 2001.

4. Medical Treatment

An employer has a continuous obligation to pay an injured employee's medical expenses, even after the employee is no longer employed by the Employer. *See* 33 U.S.C. §907(a). Dr. Lee recommended that Claimant receive medical treatment. More specifically, Dr. Lee found that Claimant requires multiple disciplinary treatment, rehab, and loss of weight. CX 18. Similarly, Dr. Tadduni also stated that Claimant is not fully recovered, although he has reached maximum medical improvement. In light of Drs. Lee and Tadduni's opinions, I find that Employer is liable for Claimant's reasonable and necessary medical treatment resulting from his work-related injury. This medical care is limited to Claimant's low back.

5. Certification of Facts Under 33 U.S.C. §927(b)

On February 11, 2002, Employer motioned the undersigned to certify the facts of this matter to the District Court of New Jersey in light of Claimant's numerous attempts at concealing post-injury earnings. I deferred judgment on this motion until the record closed and this matter was ready for decision. Therefore, I shall now address Employer's motion.

Under 33 U.S.C. §927, an ALJ shall have the power to preserve and enforce order during any such proceedings as well as to compel the attendance and testimony of witnesses, or the production of books, papers, documents, and other evidence. If any person disobeys or resists any lawful order or process, or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, or refuses to appear after having been subpoenaed, the facts shall be certified to the district court having jurisdiction in the place in which the court is sitting which shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

In this matter, Claimant has under reported earnings on his January, 1998 LS-200, which was signed by him. Further, Claimant lied to all of his examining physicians in this matter, as evidenced by Dr. Tadduni's Novemner 26, 1996 report documenting a pre-existing injury. Regarding the LS-200, Claimant had been warned of the fact that falsifying records on this form was punishable. Nevertheless, as discussed above and clearly presented in the evidence, Claimant proceeded to under report his earnings. Claimant argues that he attempted to cure these mistakes by way of answers to interrogatories and deposition testimony. However, Claimant's credibility does not permit his testimony alone to cure any submitted reports of earnings. Simply, Claimant lacks credibility and I cannot put much weight on his September 5, 2001 deposition responses in regard to the LS-200 as well as any Interrogatory responses which he submitted. The facts surrounding this LS-200 should be reviewed by the District Court.

Claimant's concealed pre-existing injury speaks for itself. Dr. Tadduni noted the 1994 hospital visit and even noted its powerful effect on his diagnosis of Claimant's condition. Although the parties have stipulated to the accident/injury arising out of and in the scope of employment, I cannot accept that stipulation as calling for me to ignore the Claimant's pre-existing injury. In doing so, I would be allowing for a gross injustice to occur by approving an award in light of Claimant's numerous deceptions. Therefore, I hold that not only is Claimant not entitled to benefits, but that the facts of this matter shall be certified to the District Court for review.

ORDER

IT IS HEREBY ORDERED that:

1. Claimant's Average Weekly Wage is $489.63 with a corresponding compensation rate of $326.42/week.

2. Employer shall provide to Claimant all reasonable and necessary medical treatment to his low back resulting from his work-related injury.

3. Under 33 U.S.C. §908(j), Claimant has forfeited his right to any compensation for the period between January 1, 1997 and October 15, 2001.

4. For the period between October 15, 2001 and March 1, 2002, Claimant is entitled to benefits resulting from a loss of wage-earning capacity totaling $182.83/week, at a compensation rate of $121.89/week.

5. For the period between March 1, 2002 and continuing, Claimant is entitled to benefits resulting from a loss of wage-earning capacity totaling $218.83/week, at a compensation rate of $144.89/week.

6. Employer is entitled to a credit of $63,169.78.[13] Therefore, Employer is not obligated to make any payments to Claimant until this amount is first exhausted.

7. The facts regarding Claimant's under reporting of income on his January 1, 1998 LS-200, as well as pre-existing injuries, shall be certified to the United States District Court for the District of New Jersey.

---

[13]Employer's Pre-Trial Report §2 states that the following payments were made to the Claimant:

Temporary Total (5/6/96 to 5/28/96)	$ 759.78
Temporary Partial (1/9/97 to 10/29/97)	$ 8,400.00
Lump sum per 1/8/97 stipulation	$ 4,000.00
Lump sum settlement	$50,000.00
Total	$63,169.78

A

PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey